

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

WILBUR K. MILLER

Tuesday, January 9, 1962
M. Bay Bar
10⁰⁰ am

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

732

United States Court of Appeals
For the
District of Columbia

No. 16688

FILED NOV 20 1961

Joseph W. Stewart
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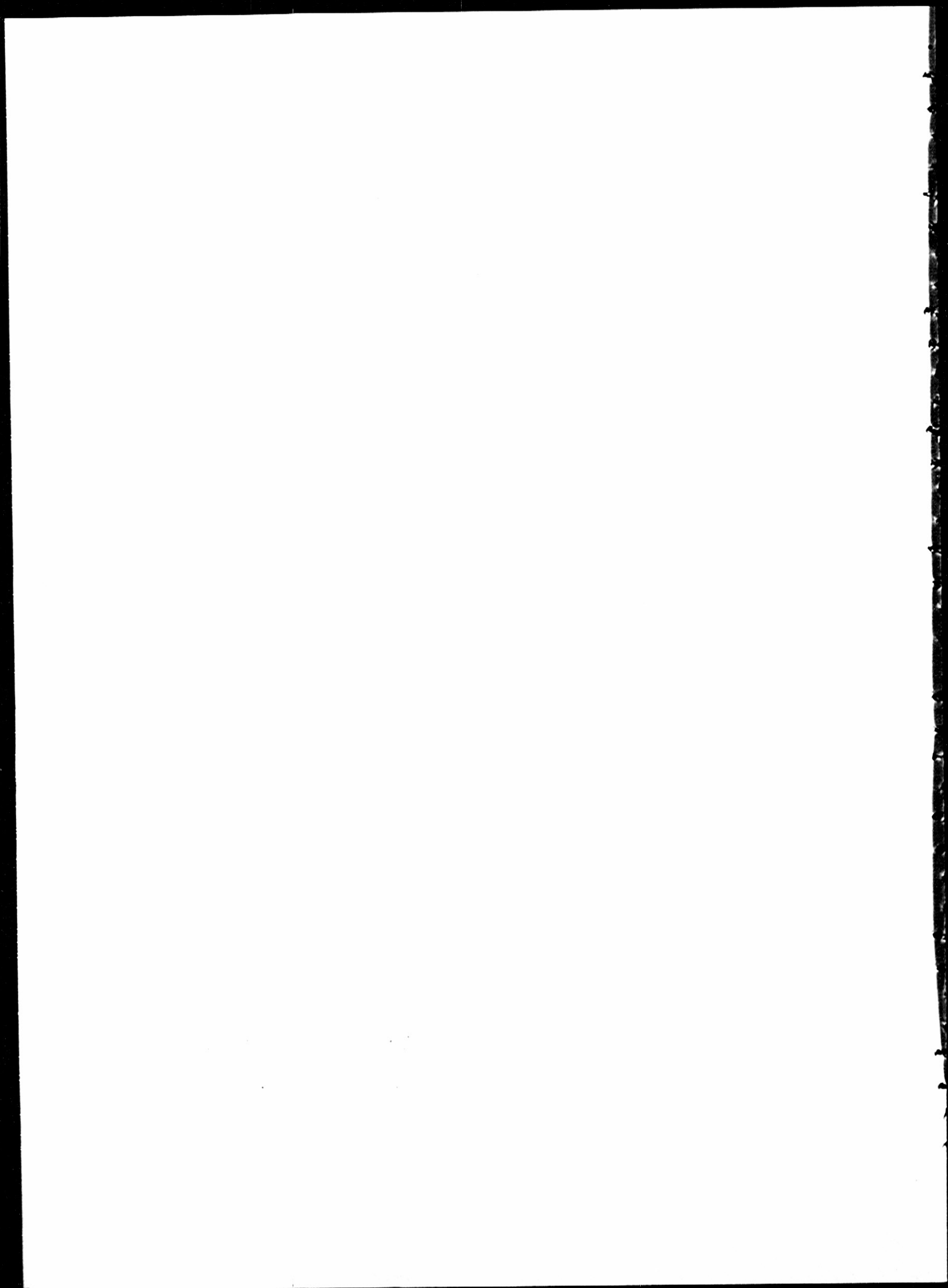
Cordell F. Harris, Appellant

v.

United States, Appellee

APPEAL FROM A ROBBERY CONVICTION
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Charles A. Hobbs
Counsel for Appellant
(Appointed by this Court)
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QUESTION PRESENTED

Where defendant and one Pearsall (not a co-defendant) are alleged to have robbed a man, and where the evidence of defendant's guilt, or indeed even of the fact that a robbery occurred, is spotty and conflicting, whether a policeman should be allowed to volunteer (not in response to the prosecutor's question) that he heard Pearsall say to defendant, while both were in custody at the police station, "We might as well admit it because he caught us anyhow, red-handed."

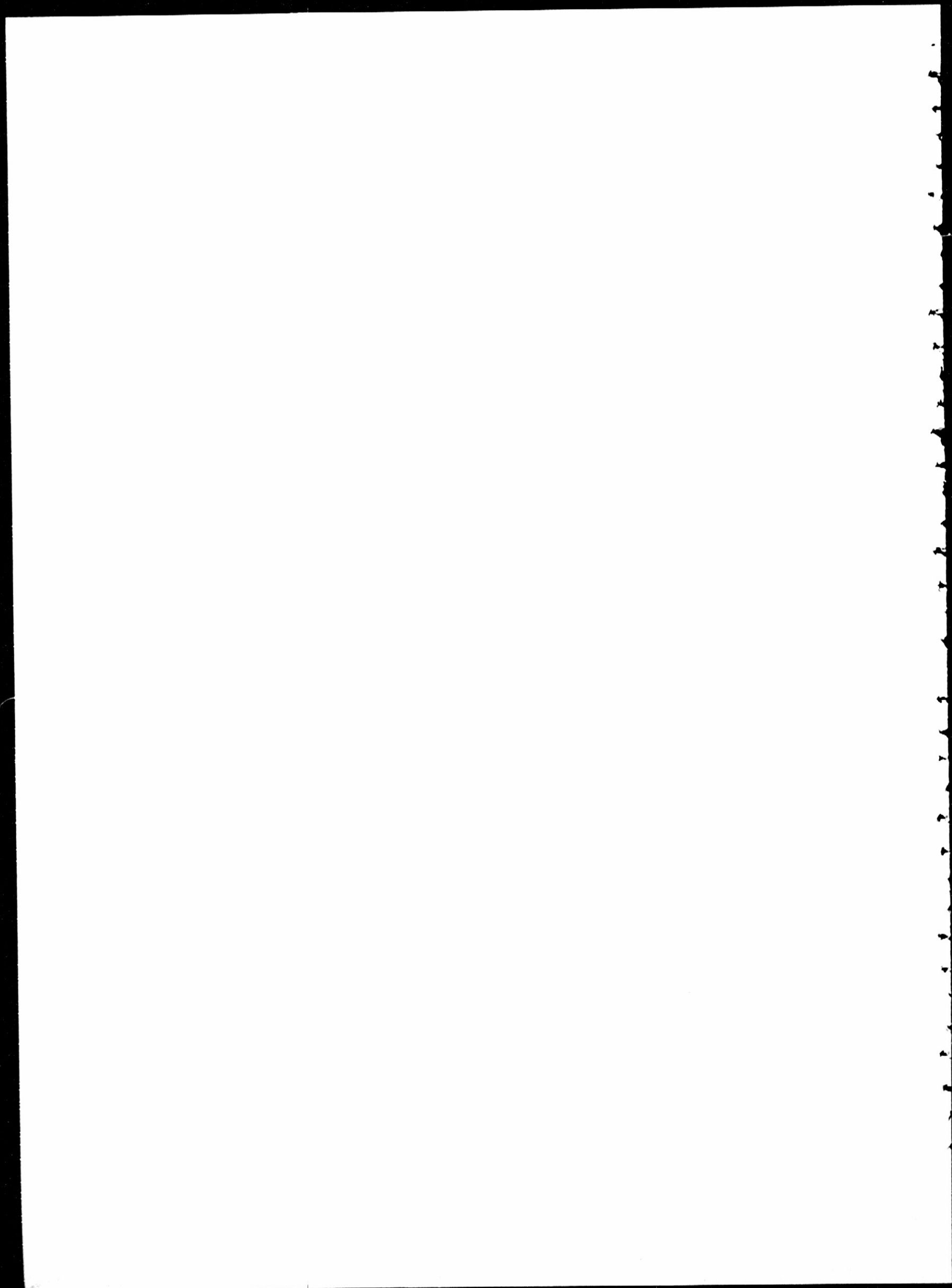


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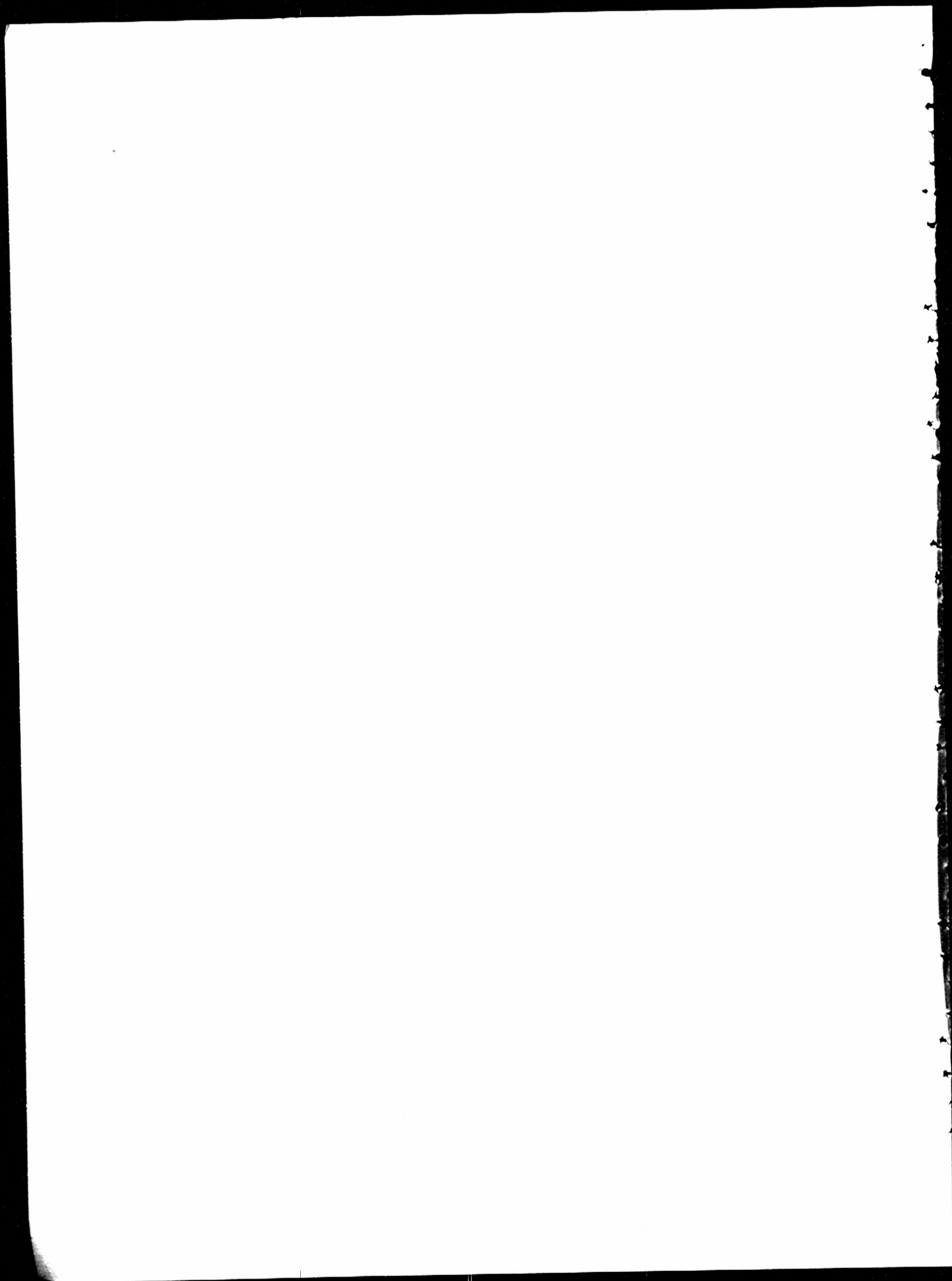
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Texts

* McCormick, Evidence (1954) -----	Throughout
* Wigmore, Evidence (1940) -----	Throughout

* Authorities especially relied on.



B R I E F F O R A P P E L L A N T

STATEMENT

This is an appeal from a conviction of assault with intent to commit robbery, and a sentence of from two to six years, imposed on February 10, 1961.

On December 5, 1960, appellant, age 28 (Tr. 105), was indicted for robbery; it was charged that on November 5, 1960, in the District of Columbia, he robbed one John M. Edwards of \$7.00 in money and one package of cigarettes valued at 20 cents.

On December 9, 1960, appellant appeared at arraignment with his appointed attorney and pleaded not guilty.

Trial was held before Judge Holtzoff on January 3, 4 and 5, 1961. After the opening statements the trial court inquired into the possibility of pleading guilty to simple assault. Tr. 13. Defendant's counsel said defendant's story was that he was trying to break up a fight between the other two men, Tr. 14, but that counsel would recommend pleading guilty to simple assault. Tr. 13. Counsel then checked with defendant, and reported back to the trial court that "He says he laid no hands on this man and did not rob him and he wants to go to trial." Tr. 15.

The first witness was John M. Edwards, the complaining witness. He said he was out walking one night when two boys

came up behind him and beat him, tore his pockets off, and took his money and cigarettes. Tr. 19, 20, 24. He said he had a five dollar bill and two ones at the time. Tr. 20.^{1/} He identified defendant as one of his assailants. Tr. 28.

On cross examination, Mr. Edwards said he was a dishwasher at National Airport, Tr. 29, earning \$40 a week, Tr. 40; that he had not been drinking that night, Tr. 32; that he couldn't drink anything, Tr. 33. He had difficulty stating how much he had been paid that week, Tr. 41-42.

The arresting officer was called. He testified that he had been on foot patrol that night, Tr. 46; that he came upon defendant down on the ground on top of Edwards, beating him and ripping his pockets off, Tr. 47; that the third person present at the scuffle was James Pearsall, age 17, Tr. 47.

The officer asked Edwards what was happening; Edwards replied they were robbing him. Tr. 50. The officer then asked defendant whether he was trying to rob Edwards; defendant denied it. Tr. 50. Then the following occurred (Tr. 52-53):

"Q. At that time [at the police station] what questions, if any, did you ask the defendant and what, if any, answers did he give? A. I again asked the defendant if he had --

"Q. Sir, in answering would you keep your voice sufficiently loud and speak distinctly? A. Yes, sir. I again asked Harris had he robbed the man. He denied it. At that time the juvenile Pearsall said, 'We might as well admit it because he caught us anyhow, red-handed.' [Emphasis added.]

^{1/}Which he carried loose in his pocket, Tr. 37

"Q. Was there further conversation, sir, after Pearsall's statement? A. I asked the complaining witness in the presence of the defendant how much was taken.

"Q. Don't answer that. Did the defendant Harris have any more to say as a result of or after Mr. Edwards' statements? A. He said that he didn't want to go to jail.

"THE COURT: He said what?

"THE WITNESS: He didn't want to go to jail.

"BY MR. ALEXANDER:

"Q. Was that the final extent of his statement? A. Yes, sir, I believe it was.

"Q. Now, this statement about not wanting to go to jail, was this made after Pearsall's statement? A. Yes, sir."

No objection was made to introduction of the hearsay underlined above and no mistrial was requested.

The officer continued that he had searched defendant, finding a wallet with two dollar bills in it. Tr. 53-54. He found nothing on Pearsall. Tr. 66. He shone his light around, but found no money on the ground. Tr. 62-63. He repeated his testimony that defendant had denied that he was robbing Edwards, and that Pearsall had said "Oh, we might as well go ahead and admit it," except that this time, the officer testified it was spoken at the scene instead of at the police station. Tr. 61.

The officer said Edwards, the complaining witness, had been drinking, Tr. 65; that when shown the two dollars taken from defendant's wallet, Edwards claimed it belonged to him, Tr. 69; that at first Edwards said he had had \$30, and later he said he had had \$11, Tr. 69.

Defendant's first witness was Pearsall, the alleged accomplice. He said that Edwards was drunk and cursing, Tr. 76; that he and Edwards got into a fight, and that defendant came over and broke it up, Tr. 77; that Edwards told the officer he had \$30, and then \$7, Tr. 78.

He said he told the officer that no robbery was intended, and that they had merely been fighting, Tr. 79-80. On cross examination he denied that he ever told the officer that "We are caught," or words to that effect. Tr. 101.

Defendant took the stand. He testified that he had been drinking whiskey and beer starting at 8 p.m. Tr. 106; that at one point during the evening Edwards had tried to borrow a quarter from him, Tr. 107; that he had had two one dollar bills in a secret compartment of his billfold, and one dollar bill in the usual compartment of his billfold, Tr. 108, 112; that he saw two people across the street fighting and went over to separate them, Tr. 110; that Edwards had been drinking, Tr. 112.

On cross, he admitted having been convicted of assault and destroying private property in March, 1954; of assault and soliciting for lewd and immoral purposes in July, 1954; of housebreaking and larceny in 1955; and attempted housebreaking in 1959. Tr. 128.

The Government called the police officer in rebuttal, who said he did not recall that Pearsall said the scuffle was a fight and not robbery. Tr. 130.

Edwards, the complaining witness, took the stand again and said he never saw defendant before the scuffle, and that he never asked defendant to lend him a quarter. Tr. 132.

The trial court instructed the jury on robbery (22 D.C. Code 2901), and the lesser included offenses of assault with intent to commit robbery (22 D.C. Code 501) and simple assault, Tr. 164-166. The trial court summarized Pearsall's alleged admission as follows (Tr. 163):

"At the precinct he [the police officer] again questioned the defendant and again the defendant denied that he had robbed or tried to rob Edwards. Pearsall, who was present, said then, according to the officer, We might as well admit this; and the officer testified that the defendant then replied, But I don't want to go to jail."^{2/}

There were no objections to the charge. Tr. 167.

The jury retired at 11:10 a.m. on January 5, 1961, and at 1:45 p.m. returned a verdict of guilty of assault with attempt to commit robbery. Tr. 168.

On February 10, 1961, the trial court held a pre-sentence hearing, at which Harris stated, "Honorable Judge, I

^{2/} The evidence does not show that the defendant then replied 'But I don't want to go to jail.' Rather, it merely shows he made it at some time after Pearsall's alleged admission. See Tr. 52-53, fully quoted at pp. 2-3, above. The trial court's comment made it appear as an immediate response, whereas it may not have been.

lived on that side of the street where these people were fighting at, so I crossed over the street merely to stop them from fighting." The court stated that the jury had rejected his story, and imposed sentence of from two to six years.

On February 18, 1961, defendant applied for leave to appeal in forma pauperis, alleging that "A. Indictment untrue to the Verdict. B. The Government violated my rights, Amendment, articles--4-5-6-7 and Article 14, section one." The application was denied by the District Court on February 24, 1961.

On April 14, 1961, he petitioned this Court for leave to appeal in forma pauperis, alleging "1. Denied right to fair and impartial trial. 2. Inadequate representation by court-appointed [sic] counsel. 3. Conflicting and inconsistent testimony of witnesses. 4. Judge erred on instructing the jury."

This Court appointed Dayton M. Harrington, Esq., to file a memo in support of the petition. On July 13, 1961, Mr. Harrington reported that appellant claimed error in that (1) his indictment charged robbery whereas he was convicted of assault with intent to commit robbery; (2) the police went into a secret compartment of his billfold without permission, and he wasn't allowed to complain of this at trial; (3) he received inadequate representation in that he had not been advised that he could be convicted of a lesser included offense; and (4) the judge had persuaded the jury.

On August 1, in a supplemental memo, Mr. Harrington stated that one of his informants had raised a question whether appellant had been convicted of a "lesser included" offense carrying a greater penalty than the so-called greater offense.^{3/}

Mr. Harrington requested leave to withdraw, which was granted on August 2, 1961. At the same time appellant was allowed 30 days to file his own memo in support of the appeal.

On August 24, appellant filed a memo complaining (1) that the indictment charged robbery, but he was convicted under 22 D.C. Code 501 [assault with intent to rob]; (2) that he was indicted under 18 U.S.C. 2113 [bank robbery] or 22 D.C. Code 2901 [robbery] and therefore should have been acquitted; and (3) that "The Presiding Judge transposed Impromptu the Codes of Law in his instructions to Jury in the Court below." (sic).

On September 8, 1961, this Court allowed the appeal in forma pauperis, and appointed the undersigned to represent appellant. The Court did not indicate the reasons why it allowed the appeal.

After carefully considering all points raised by petitioner, and after searching the transcript for error, counsel is of the opinion that the only prejudicial error in the case is one not

^{3/} Undersigned counsel notes that the crime for which appellant was indicted, 22 D.C.C. 2901, carries a penalty of 6 months to 15 years. The crime of which he was convicted, 22 D.C.C. 501, carries a penalty up to 15 years. The additional-sentence-for-previous-offenders provisions of 24 D.C.C. 203 do not apply to either crime. As stated earlier, appellant received a sentence of 2 to 6 years.

heretofore raised, and one not objected to at trial; namely, the admission into evidence of the police officer's statement that Pearsall said "We might as well admit it because he caught us anyhow, redhanded." Tr. 52.

SUMMARY OF ARGUMENT

Pearsall's alleged admission that he and defendant had been caught red-handed was pure hearsay. It could not come in as a declaration against interest because Pearsall was available to testify. Wigmore, Evidence §1455 (1940); McCormick, Evidence §253 (1954). Nor did it satisfy any other exception to the Hearsay Rule.

It was extremely prejudicial, because the case was a close one, and it was the very kind of evidence which could well have led the jury to resolve the conflict of evidence against defendant. The error was so clear that this Court can notice it despite lack of objection below. F. R. Crim. P. 52(b).

ARGUMENT

I. Admitting the Hearsay Was Error.

At the outset the Court is reminded of the primary constitutional and historical basis of the Hearsay Rule, that a defendant has a right to confront and cross-examine the witnesses against him. McCormick, Evidence, §224 (1954); Wigmore, Evidence §§1362, 1364, 1395 (1940). If the Hearsay Rule was violated, there was error below.

The prosecutor asked the officer what did he, the officer, ask the defendant, and what did the defendant answer. The officer replied (Tr. 52):

"Yes sir. I again asked Harris [defendant] had he robbed the man. He denied it. ..."

But the officer then ceased being responsive, and gratuitously added:

"... At that time the juvenile Pearsall [the alleged accomplice] said, 'We might as well admit it because he caught us anyhow, redhanded.'"

Was this true hearsay? Clearly. There was no non-testimonial purpose for it; it was significant only testimonially. Hearsay has been defined as "testimony in court ... of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." McCormick §225; see Wigmore §1361. This was hearsay, because it carried the testimonial freight that "The defendant and I in fact are guilty."

Does this hearsay fall within any recognized exception? No. It was not an admissible declaration against interest, because the declarant must be unavailable, and Pearsall was as available as could be, and in fact testified later. McCormick states that in

order for the declaration-against-interest exception to apply, "the declarant must be unavailable at the time of trial." §253. Wigmore says "The Exception requires, like most of the others, first, a Necessity for resorting to hearsay ... i.e., the death of the declarant, or some other condition rendering him unavailable for testimony in court; ..." §1455.^{4/}

It was of course not an "admission" because Pearsall was not a party. McCormick §239. Even had Pearsall been a co-defendant, the statement could not have been used against defendant himself. Wigmore §1076(3).

Possibly if Pearsall and defendant were conspirators, the "admission" of one would be admissible against all. McCormick §244 (pp. 521-523); Wigmore §1079(1). But there was no conspiracy claimed or proven here, and in any event, even under the most liberal rule the "co-conspirator's admission" must have been made before execution of the crime. Fiswick v. United States, 329 U.S. 211 (1946); McCormick §244; see Model Code of Evidence Rule 508(b); Uniform Rule of Evidence 63(9)(b), both quoted in McCormick, §244.

^{4/} It is noted that even if Pearsall were unavailable, it seems that many courts would still not allow the instant statement as a declaration against interest, because it concerned Pearsall's penal interest, not his pecuniary or proprietary interest. Wigmore §1476, McCormick §255; the Sussex Peerage Case, 11 Cl. & F. 85, 8 Eng. Rep. 1034 (1844). One Maryland case even excluded a confession as not admissible even to discredit the declarant testifying for the state. Munshower v. State, 55 Md. 11, 18 (1880).

And of course the hearsay was not admissible to impeach Pearsall, because Pearsall had not yet testified. (Pearsall, it will be recalled, later denied that he made the admission of guilt to the officer, Tr. 101.)

Were there special circumstances of necessity and trustworthiness which argue for an exception to the Hearsay Rule? No. Clearly there was no necessity, because Pearsall was available and did testify. Perhaps the fact that the witness was a police officer, presumably with no motive to testify falsely, is a factor of reliability. And the statement was against Pearsall's interest, which is a factor of reliability, though not enough by itself to warrant letting it in, see the declaration-against-interest rule above, McCormick §253; Wigmore §1455. On the other hand, the police do have an interest in seeing convicted those whom they have arrested, and whom they believe guilty. This interest could subtly cause ambiguities or memory doubts to be resolved or interpreted against the defendant, and this is one of the very hazards the Hearsay Rule protects against. McCormick §224 (p. 458).

This evidence was simply not admissible through the officer. If the prosecutor wanted to prove Pearsall's admission, he should have asked Pearsall, and if Pearsall denied it, as he would (and later did, Tr. 101), laid a foundation for calling the officer on rebuttal to contradict Pearsall.^{5/}

^{5/} Note, however, that Pearsall's alleged statement was probably a "collateral" fact (since defendant, not Pearsall, was on trial), and hence the prosecutor would be foreclosed by Pearsall's answer, and would not be entitled to call the officer to contradict him. McCormick §47; Wigmore §1001.

II. The Error Was Prejudicial

The prejudice is self-evident. When the parties rested, the jury had heard everyone agree that there had been a scuffle involving Edwards, Pearsall and defendant. The crucial question was whether defendant was in the scuffle with intent to rob. Edwards said yes. But Edwards was impeached--- he said he had not been drinking, and in fact could not drink, Tr. 32-33, but the policeman, Pearsall and defendant all said he had been drinking. Tr. 65, 76, 112. Edwards testified he had had \$7.00 on his person prior to the alleged robbery, Tr. 20, but he told the officer at the police station that he had \$30, then \$11. Tr. 69. None of the alleged \$7 was ever found, Tr. 62-63, unless it was the \$2 found in defendant's wallet Tr. 53-54. Since the officer appeared while the scuffle was in progress, it is unlikely that this \$2 had found its way from Edwards' pocket to defendant's wallet. The jury probably so found by refusing to return a verdict of robbery.

The policeman didn't know whether the scuffle was for the purpose of robbery or not, except that Edwards told him so. True, the officer said he saw defendant beating Edwards and tearing his pockets, Tr. 47, but this is not inconsistent with defendant's story that he joined the scuffle to separate Pearsall and Edwards. Tr. 106.

It is entirely possible that the jury might have had a reasonable doubt about defendant's intent to rob, except for the introduction of the hearsay.

It is true that Pearsall later took the stand and denied that he admitted guilt to the officer. That such denial was elicited from him may have been defense counsel's desperate attempt to weaken the force of the blow dealt by the officer. But it did not even the score; the error was not thus cured; the prejudice remained.

III. The Error May Be Raised Despite Lack of Objection Below.

In the first place, defense counsel could not reasonably be expected to object in time to keep the hearsay out. The officer slipped it in without being asked. See Tr. 52, quoted in the Statement above.

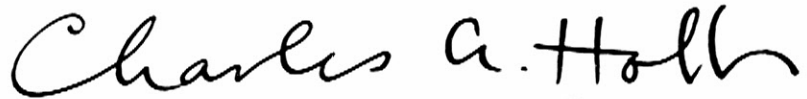
Secondly, an experienced trial counsel, caught by surprise by the unresponsive answer of the officer, might very well have immediately decided that it would be dangerous to spotlight the hearsay by stopping the testimony to take exception to it. Even if argued out of the jury's hearing, the jury would have had a long pause, and the words ringing in their minds while they waited would be the damaging words last spoken by the officer. And even if the Court agreed there was error, it might merely have given a cautionary instruction, which experienced counsel might well prefer to do without, as another form of spotlight.

Whatever counsel's reasons, if any, for not objecting after the officer's unresponsive answer to the prosecutor's question, the error looms too large to make its correction depend on a timely objection. This is a case properly within F. R. Crim. P. 52(b).

CONCLUSION

A man caught in an ambiguous situation, which might or might not be a crime, and who has steadfastly denied his guilt at every stage of the case from arrest to sentencing to appeal, and against whom the evidence is not clear and convincing, may have to suffer the prejudice of having his past criminal record disclosed to the jury. But he should not also have to suffer the prejudice of having a third party admit his guilt for him, at least where the third party denies under oath and subject to cross-examination that he ever made such an admission, and the proof of the alleged admission rests entirely on hearsay. The judgment should be reversed and a new trial awarded.

Respectfully submitted,

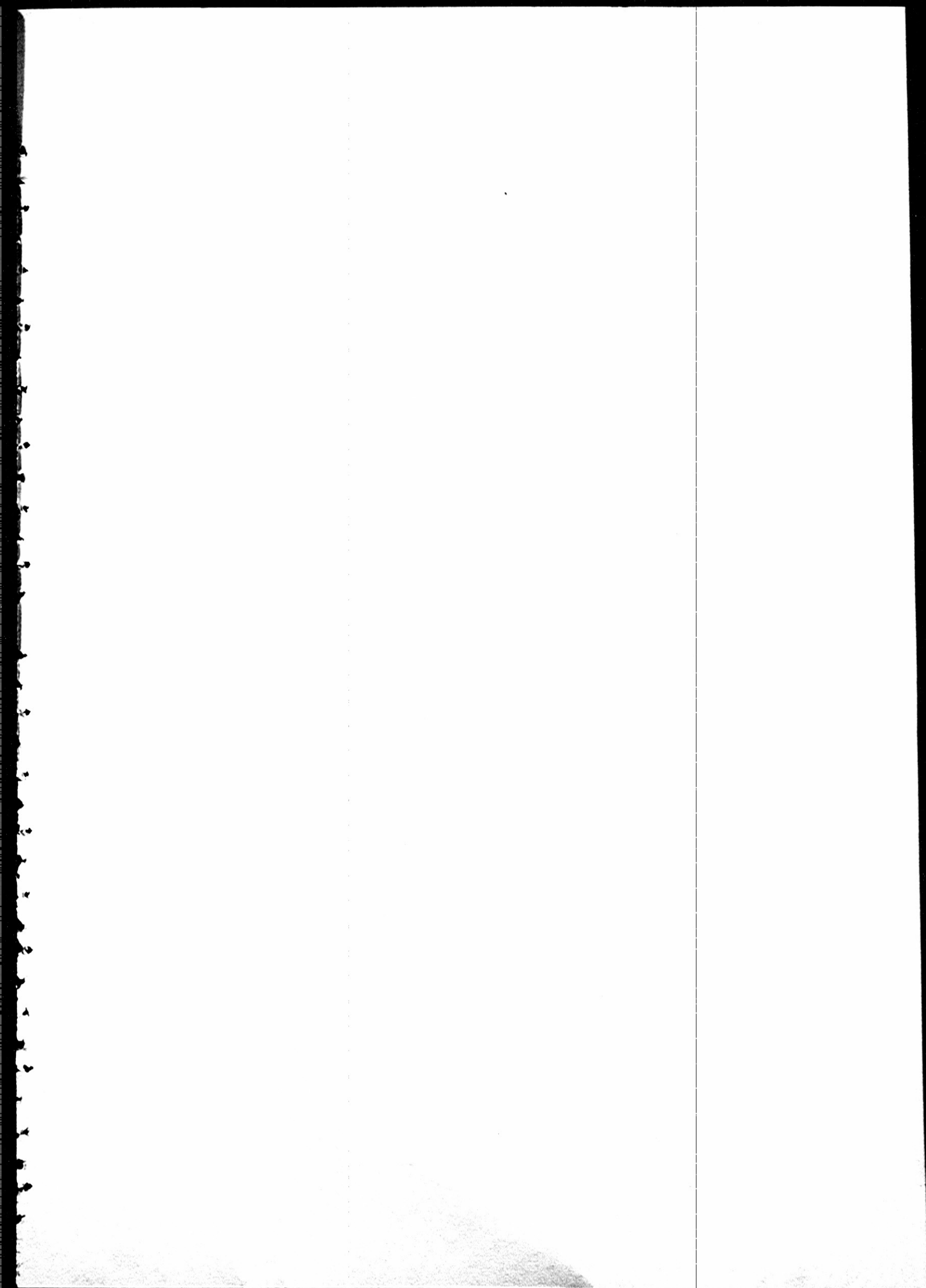


Charles A. Hobbs
Attorney for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

Served this 16 day of November, 1961, by leaving a copy with the United States Attorney for the District of Columbia, U.S. Courthouse, Washington, D.C.

Charles A. Hobbs



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BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,688

CORDELL F. HARRIS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**Appeal from the United States District Court
for the District of Columbia**

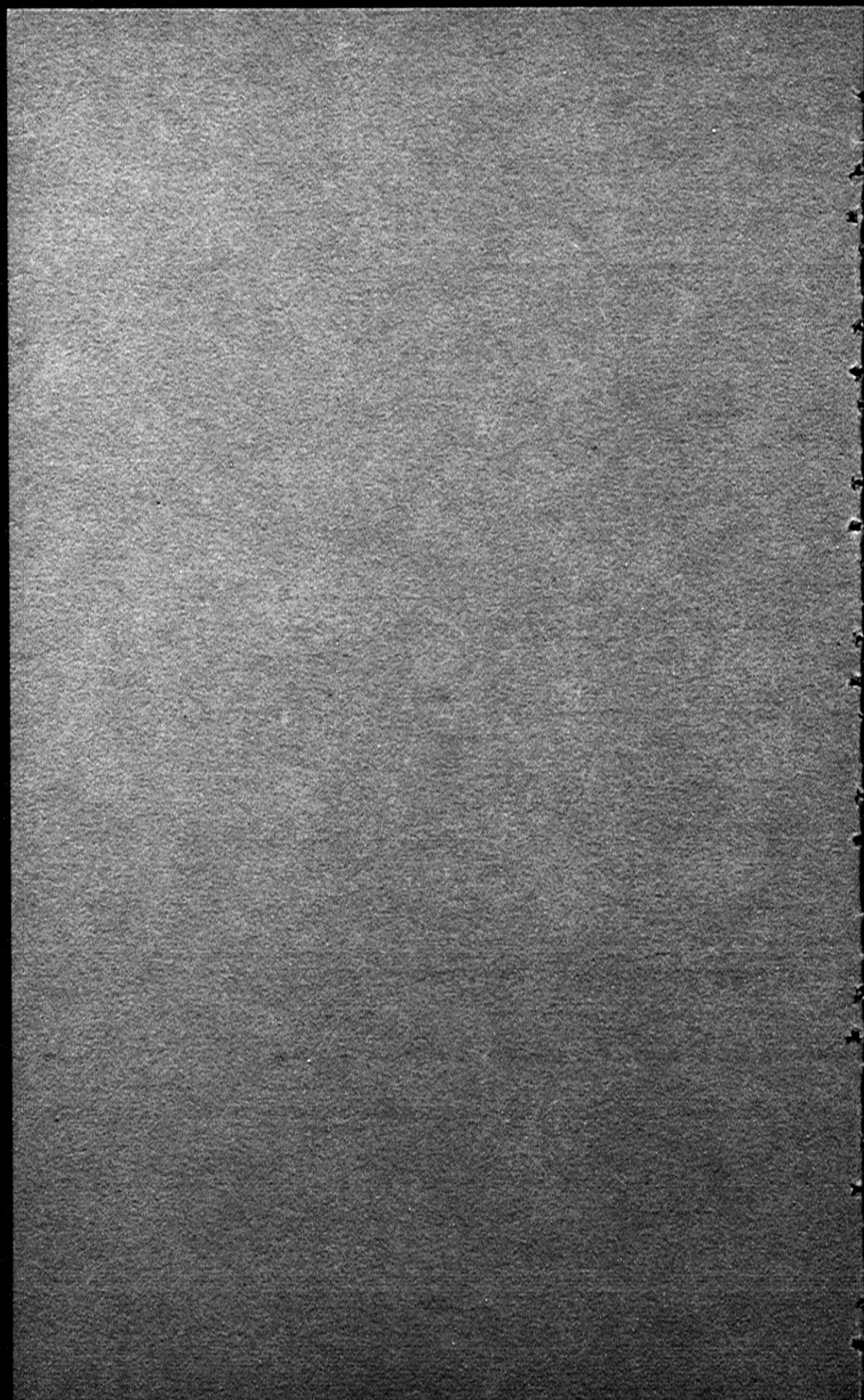
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Assistant United States Attorneys.

*United States Court of Appeals
For the
District of Columbia Circuit*

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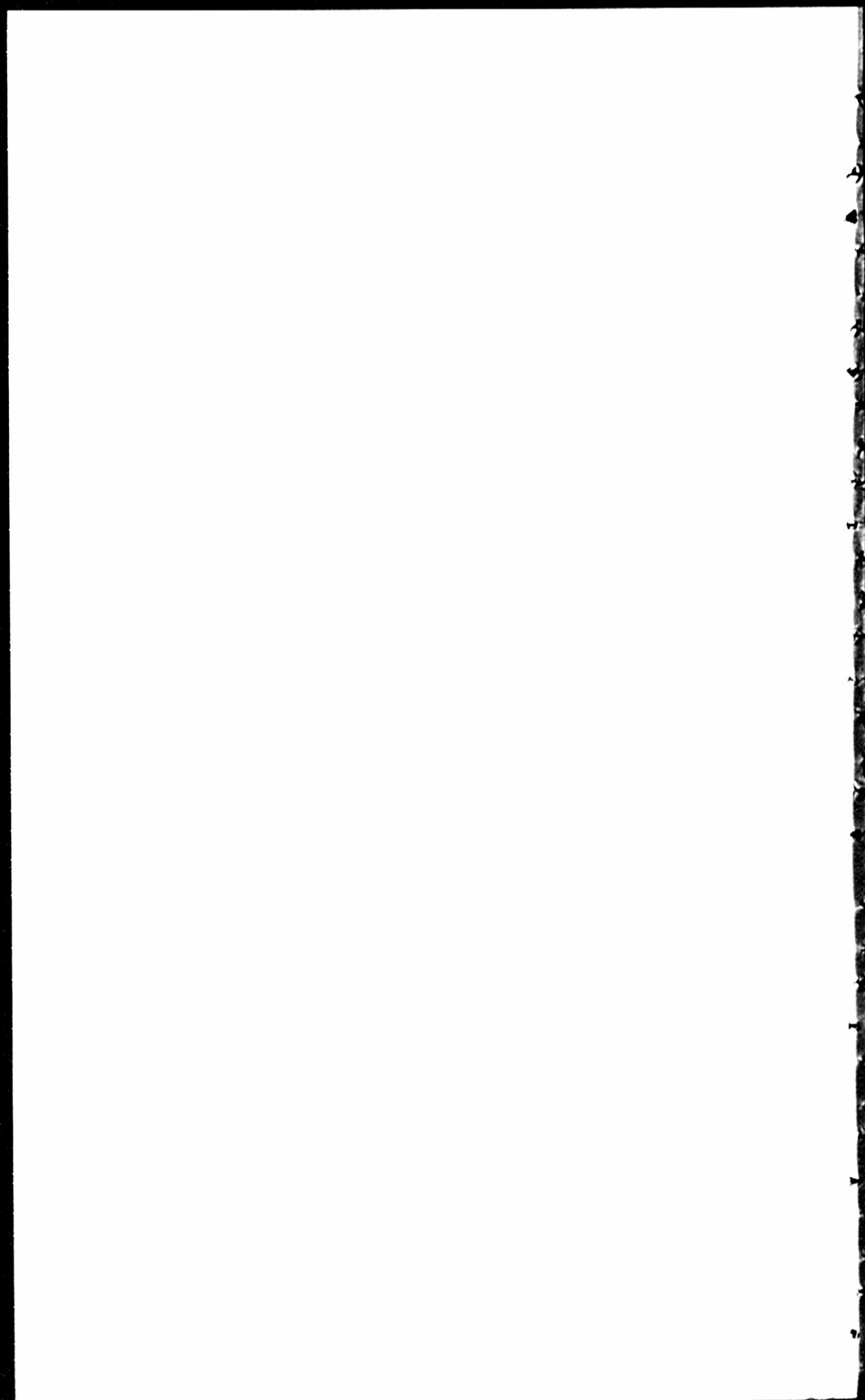


No. 16,688

QUESTION PRESENTED

Appellant was convicted of assault with intent to commit robbery. In the opinion of appellee, the following question is presented:

Was it reversible error to receive into evidence an incriminating statement made by appellant's accomplice in his presence, to which appellant gave an equivocal response, where no objection was raised below to the reception of such evidence, and where the government adduced substantial other evidence against appellant?



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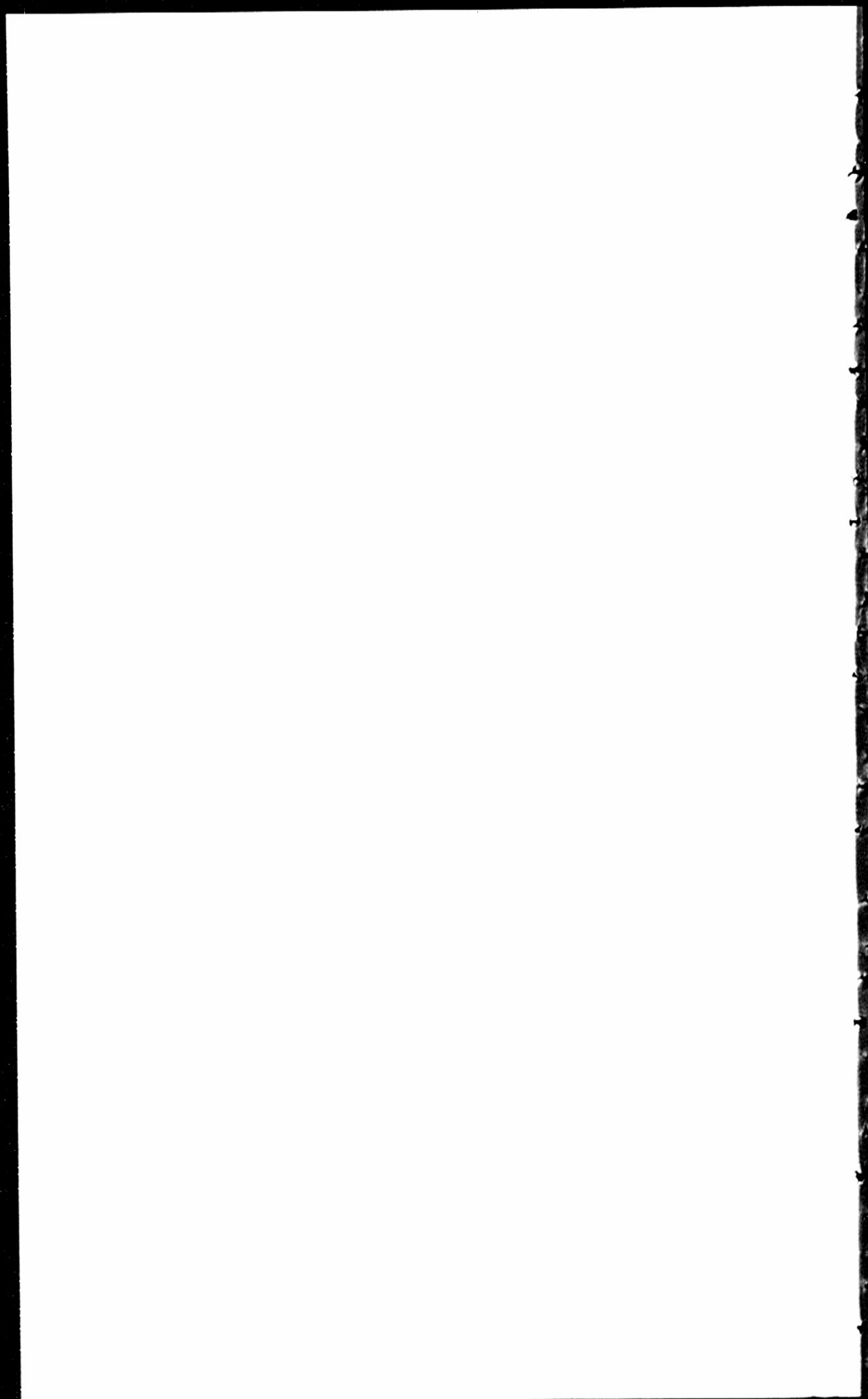
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OTHER REFERENCES

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* Cases or authorities chiefly relied upon are marked by asterisks.



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,688

CORDELL F. HARRIS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**Appeal from the United States District Court
for the District of Columbia**

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On December 5, 1960, an indictment charging appellant with robbery (22 D.C.C. 2901) was filed in the District Court (J.A. 1). On December 9, 1960, appellant entered a plea of not guilty at his arraignment (J.A. 1-2). After trial, the jury found appellant guilty of assault with intent to commit robbery (J.A. 18-19), and he was sentenced to a term of imprisonment of from two to six years (J.A. 19). From this judgment of conviction he appeals.

Based upon all the evidence adduced at trial, it is undisputed that the following incident took place: in the early morning hours of Saturday, November 5, 1960

(between 1:30 and 2:00 in the morning) one John M. Edwards, while walking in the 600 block of M Street, Northwest, was struck or pushed by appellant or one James Pearsall and knocked to the ground. Appellant was on the ground with Edwards when he was spotted by Police Officer John H. Mitchell. Officer Mitchell intervened, arrested appellant and Pearsall, and took them, along with Edwards, to the Second Precinct Police Station. The complainant Edwards at this time had "blood on his face, he was beaten, had knots on his head and on his side" (J.A. 12). Further, the pockets of Edwards' trousers had been completely ripped off.

The Case For The Government.

The evidence adduced at trial supports the jury's verdict of guilty of assault with intent to commit robbery in the following manner: Edwards testified that he was walking home when "two boys came up behind me and one struck me [on the] back of the head and knocked me down and then jumped on me and stripped my pants on the side and taken my money out of my pocket and my cigarettes and beat me up." (J.A. 4)

By the term "stripped my pants", the witness explained that the pockets had been torn out of his trousers, and that the trousers were ripped open down each side (*ibid.*). Although Edwards could not tell which of his two assailants had struck the first blow (J.A. 6) nor (because of the suddenness and violence of the encounter) "which one it was was in my pocket" (*ibid.*), he identified appellant as one of his attackers (J.A. 5).¹ He further testified that seven dollars, "a five dollar bill and two ones" (J.A. 4) which he had carried "loose in my pocket" (J.A. 6) were taken from him.

Officer Mitchell confirmed the complainant's account of the assault (see J.A. 7-8); he testified that "about 2 a.m.

¹ Pearsall who was 17 years old at this time, came within the jurisdiction of Juvenile Court, and therefore was not tried in District Court.

on that morning, I observed the defendant Harris [appellant] down on the complainant, beating him and ripping his pants pockets off." (J.A. 7) The officer testified that while this was happening, he observed Pearsall "standing up over the defendant and complainant" (J.A. 8); he went on to relate that "I then ordered Pearsall to step back and sit on the knoll of the street and also I had to pull Harris [appellant] off of the complaining witness." (*ibid.*) Officer Mitchell corroborated Edwards' testimony as to the state of his trousers, stating that the complainant's pockets "were completely ripped off"; "he couldn't hold his pants up, they were torn so badly until he couldn't hold his pants". (J.A. 8) The officer further confirmed that Edwards appeared badly beaten (J.A. 8; 12). It is undisputed that when appellant was searched (later, at the station), two one dollar bills were recovered from his person.

In the course of Officer Mitchell's direct examination, the following testimony was adduced:

- Q. At that time what questions, if any, did you ask the defendant and what, if any, answers did he give?
- A. I again asked the defendant if he had—
- Q. Sir, in answering would you keep your voice sufficiently loud and speak distinctly?
- A. Yes, sir. I again asked Harris had he robbed the man. He denied it. At that time the juvenile Pearsall said, "We might as well admit it because he caught us anyhow, redhanded."
- Q. Was there further conversation, sir, after Pearsall's statement?
- A. I asked the complaining witness in the presence of the defendant how much was taken.
- Q. Don't answer that. Did the defendant Harris have any more to say as a result of or after Mr. Edwards' statements?
- A. He said that he didn't want to go to jail.

THE COURT: He said what?

THE WITNESS: He didn't want to go to jail.

BY MR. ALEXANDER:

Q. Was that the final extent of his statement?

A. Yes, sir, I believe it was.

Q. Now, this statement about not wanting to go to jail, was this made after Pearsall's statement?

A. Yes, sir.

(J.A. 9).

No objection was taken to this testimony.

The Case For The Defense.

Both appellant (who took the stand in his own behalf) and James Pearsall testified that the incident described above had been a mutual affray. Pearsall testified that when Officer Mitchell arrived on the scene "all three" of the men (Edwards, Pearsall and appellant) "were on the ground" (J.A. 13). Appellant, however, could not recall seeing Pearsall on the ground with Mr. Edwards. (J.A. 16). He also could not recall if he himself had been on the ground with the complainant (J.A. 15). Pearsall admitted having observed that the complaining witness's trousers were torn (J.A. 13-14). Appellant "didn't notice them that close" (J.A. 16). Both denied having made inculpatory statements (see J.A. 14; 15). Pearsall in particular denied the statement attributed to him by Officer Mitchell (J.A. 14) and set out at length, *supra*.

STATUTE AND RULE INVOLVED

Title 22, District of Columbia Code (1961 Edition) Section 501 provides:

Assault with intent to kill, rob, rape, or poison.
Every person convicted of any assault with intent to kill or to commit rape, or to commit robbery, or mingling poison with food, drink, or medicine with intent to kill, or wilfully poisoning any well, spring, or cistern of water, shall be sentenced to imprisonment for not more than fifteen years.

Rule 52(b) of the Federal Rules of Criminal Procedure, 18 U.S.C., provides:

Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

SUMMARY OF ARGUMENT

Where an incriminating statement is made in an accused's presence, and the accused's response is equivocal or evasive, the entire conversation is admissible. It is the jury's function to determine whether the extra-judicial statement of the accused was in fact an acknowledgment of the third-party's inculpatory statement. Here, evidence was adduced that Pearsall, appellant's accomplice, stated in his presence "We might as well admit it because he caught us anyhow, redhanded." Appellant stated that "he didn't want to go to jail." This conversation falls within the rule set out above, and is admissible. In the absence of objection, its reception does not constitute plain error. Moreover, the government adduced substantial other evidence against appellant.

ARGUMENT

Evidence of A Statement Made By Appellant's Accomplice And Appellant's Response Thereto Was Admissible

Officer Mitchell testified that when appellant and his accomplice, James Pearsall, arrived at the police station, Pearsall said: "We might as well admit it because he caught us anyhow, redhanded." (J.A. 9) The police officer then testified as follows:

Q. . . . Did the defendant Harris have any more to say as a result of or after Mr. Edwards' statements?

A. He said that he didn't want to go to jail.

THE COURT: He said what?

THE WITNESS: He didn't want to go to jail.

BY MR. ALEXANDER:

Q. Was that the final extent of his statement?

A. Yes, sir, I believe it was.

Q. Now, this statement about not wanting to go to jail, was this made after Pearsall's statement?

A. Yes, sir. (J.A. 9)

Officer Mitchell testified that at two different times prior to Pearsall's statement, appellant had denied any wrongdoing. (J.A. 9; 11) When Pearsall made this statement incriminating him, appellant did not deny guilt. Nor did he remain silent. Instead, he stated that "he didn't want to go to jail." This conversation was properly admitted into evidence as an exception to the hearsay rule.

It is well-settled that "[w]here accusatory statements are made in defendant's presence or hearing, * * * an evasive answer or one unresponsive to the statement may be the basis for an inference of acquiescence" which renders both the statement and the defendant's response thereto admissible. *United States v. Kelly*, 119 F. Supp. 217, 221-222 (D.C.D.C. 1954). Admissibility is based upon the premise that "if [the accused] had been innocent" when directly implicated in the commission of an offense, "it is but natural to presume that he would at once have attempted to refute the charge, and vindicate himself by explicit denial, instead of the evasive * * * answer given by him", *Snowden v. United States*, 2 App. D.C. 89, 93 (1893). See also, e.g., *Arpan v. United States*, 260 F.2d 649, 655 (8th Cir. 1958); *McUin v. United States*, 17 App. D.C. 323, 332 (1900); *People v. Davis*, 43 Cal. 2d 661, 276 P.2d 801, 805-806 (1954), cert. denied 349 U.S. 905 (1955); 4 WIGMORE, EVIDENCE §§ 1071-1072 (3d ed. 1940).

The record here shows that a jury could permissibly determine that appellant had acknowledged his accomplice's statement of guilt; appellant's reply to the statement "we might as well admit it" may reasonably be interpreted to mean "yes, however, I don't want to go to jail." The following cases are illustrative of the proposition that extra-judicial conversations similar in tone to the one under discussion are admissible; in all these cases the ultimate fact of acknowledgment is left for the jury to resolve. *Commonwealth v. Devlin*, 335 Mass. 555, 141

N.E.2d 269, 280 (1957) (co-defendant made statement incriminating defendant Russell in his presence; defendant asked "What do you say now, Russell". Defendant answered "What can I say." Held, entire conversation admissible since this reply "was not a denial, but an equivocal response subject to the interpretation that he meant it was useless to deny it."); *People v. Brown*, 87 Cal. App. 2d 281, 196 P.2d 936, 939 (1948), *cert. denied*, 336 U.S. 921 (1949) (complaining witness accused defendant in his presence of being the man who had raped her; he replied "Did you ever see me before?" Held, "In the first place this was not objected to, and, secondly, it was an equivocal response which was a proper subject for the jury to weigh."); *People v. Ramsey*, 83 Cal. App. 2d 707, 189 P.2d 802, 812 (1948) (abortion prosecution where officer confronted defendant prior to trial with certain instruments found in her home and asked "What about this?" Defendant answered "Can you imagine that?" Held, entire conversation admissible.); *People v. Popilsky*, 366 Ill. 268, 8 N.E. 2d 640, 641 (1937) (Witness's statement was "There is the man". Officer said to defendant "Are you the guy?"; in reply, defendant said, "I don't know anything about it; give me a break." Held not error to permit this conversation to go to jury.)

We submit in short that the officer's testimony would have been properly admitted into evidence even had there been an objection to its reception; in the absence of an objection at trial (as is the case here), such reception assuredly does not constitute plain error where the direct evidence of appellant's guilt is so substantial (see Counterstatement, *supra*, pp. 2-4).²

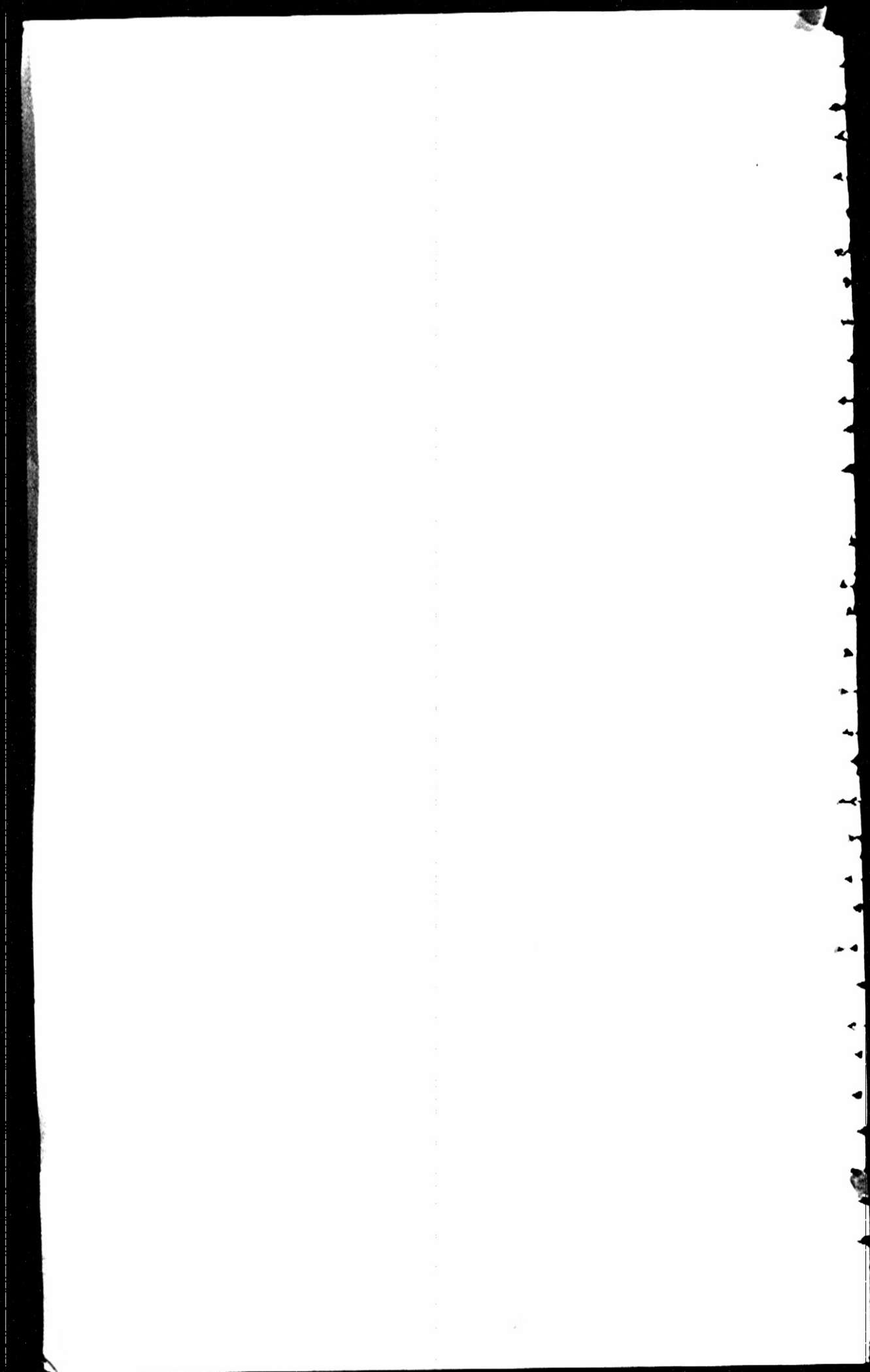
² Assuming, for the sake of argument that this evidence was unrelieved hearsay, it is nevertheless true, by the overwhelming weight of authority, that unobjected-to hearsay receives its natural probative effect as if it were in law, admissible. See, e.g., *Diaz v. United States*, 223 U.S. 442, 450 (1912); *Crawford v. United States*, 91 U.S. App. D.C. 234, 236, 198 F.2d 976, 978 (1952); *Byars v. United States*, 238 F.2d 82, 83 (6th Cir. 1956); *United States v. Fleming*, 134 F.2d 776, 778 (2d Cir. 1943); 1 WIGMORE, EVIDENCE § 18 (3d ed. 1940).

CONCLUSION

Wherefore, it is respectfully submitted the judgment of the District Court be affirmed.

DAVID C. ACHESON,
United States Attorney.

NATHAN J. PAULSON,
JUDAH BEST,
Assistant United States Attorneys.



JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

736

No. 16,688

CORDELL F. HARRIS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals

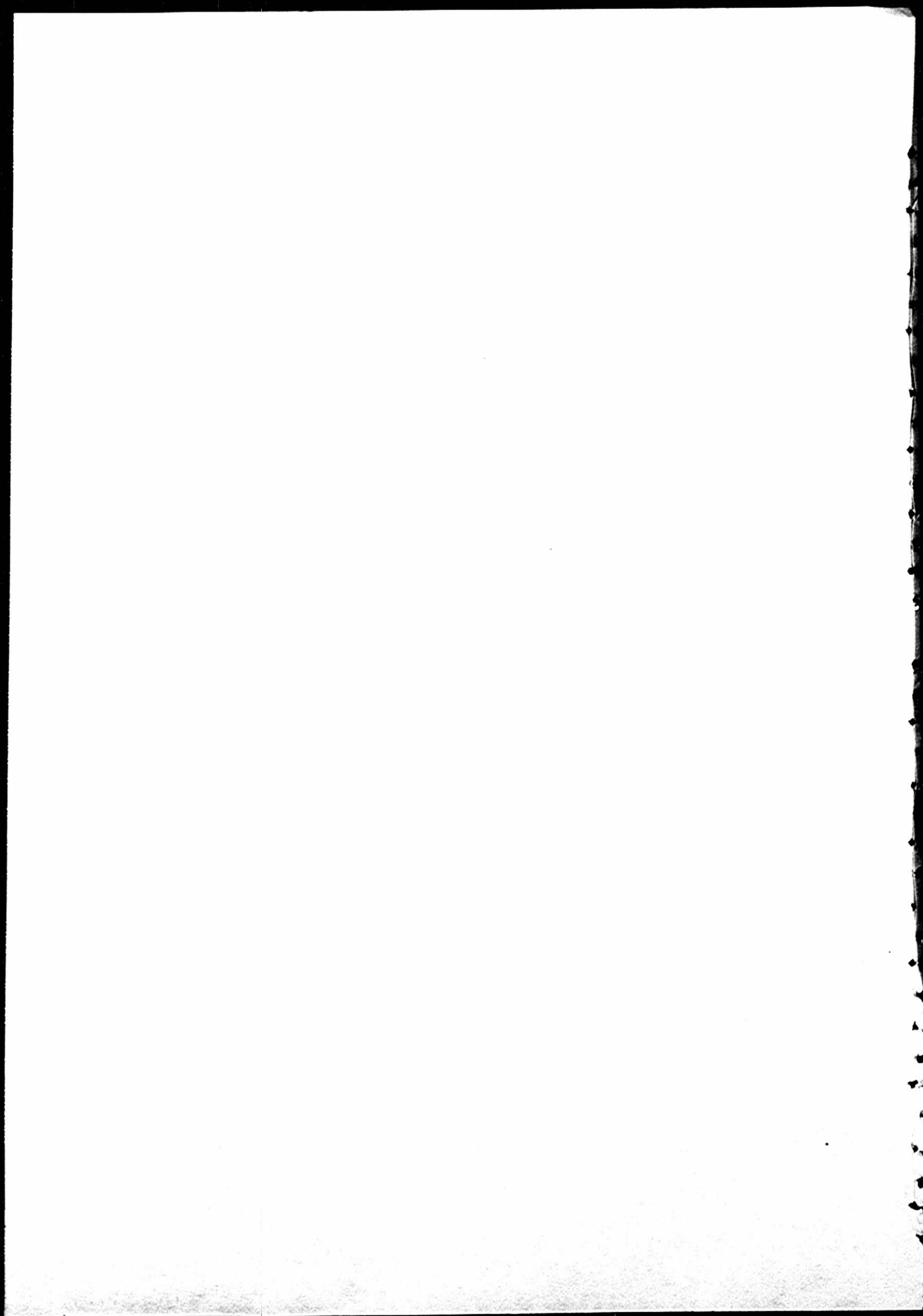
For the

District of Columbia Circuit

FILED JAN 2 1962

Joseph W. Stewart

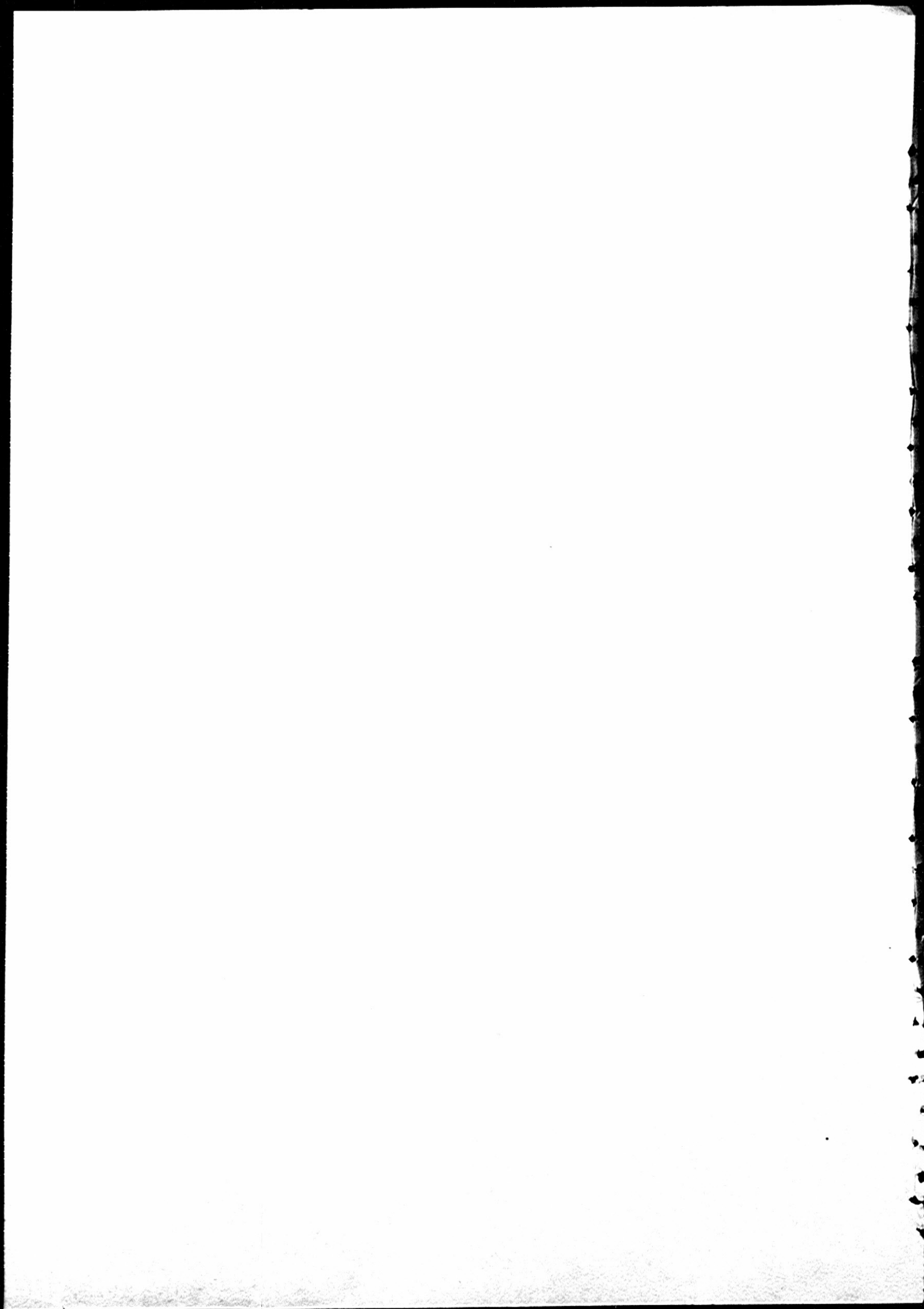
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JOINT APPENDIX

[Filed December 5, 1960]

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Holding a Criminal Term

* * *

Grand Jury Impanelled on October 27, 1960, Sworn in on November 1, 1960

THE UNITED STATES OF AMERICA : Criminal No. 1009-'60

v.

: Grand Jury No. 1348-60

CORDELL F. HARRIS

: Robbery (22-2901 D.C. Code)

The Grand Jury charges:

On or about November 5, 1960, within the District of Columbia, Cordell F. Harris by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, stole and took from the person and from the immediate actual possession of John M. Edwards property of John M. Edwards of the value of about \$7.20 consisting of the following: \$7.00 in money and one package of cigarettes of the value of \$0.20.

/s/ OLIVER GASCH
Attorney of the United States
in and for the District of Columbia

A TRUE BILL:

/s/ James M. Barry
Foreman.

[Filed December 9, 1960]

PLEA OF DEFENDANT

On this 9th day of Dec., 1960, the defendant Cordell F. Harris, appearing in proper person and by his attorney Warren Magee, being arraigned in open Court upon the indictment, the substance of the charge

being stated to him, pleads not guilty thereto.

Warren Magee, Esq. requests that appointment to defend be vacated, which is so ordered by the Court; thereupon the Court orders that new counsel be appointed to defend.

The deft. is remanded to the District Jail.

By direction of
JOHN J. SIRICA
Presiding Judge
Criminal Court #3

Present:

United States Attorney

* * *

By: Fred McIntyre
Assistant United States Attorney

[Filed October 19, 1961]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1

Washington, D. C.
January 3, 1961

The above-captioned cause came on for trial before the HONORABLE ALEXANDER HOLTZOFF, Judge, United States District Court for the District of Columbia, and a jury.

APPEARANCES:

On behalf of the Government:

HARRY T. ALEXANDER, ESQ.
Assistant United States Attorney

On behalf of the Defendant:

SAMUEL HERMAN, ESQ.
Washington, D. C.

* * * * *

16

JOHN M. EDWARDS

called on behalf of the Government, and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ALEXANDER:

Q. Sir, would you state your name and address, please? A. John

Edwards. * * * * *

17 Q. What is your present address, sir? A. 1244 10th Street.

Q. 1244 10th Street? A. That's right.

Q. Northwest or Northeast? A. Northwest.

Q. Is that in the District of Columbia? A. That's right.

Q. Now, sir, about November 5, 1960, what was your address then? A. It was 606 M Street then.

Q. Is that M as in Mary? A. Yes.

18 Q. 606 M Street, Northwest, is that right? A. That's right.

* * * * *

Q. I'd like to direct your attention to on or about November 5, 1960, when you lived in the 600 block of M Street. Did anything unusual happen to you? A. Well, I tell you, I went to the store to get me some cigarettes and on the way back home --

19

Q. What day was that? A. That was on a Friday night, of which it was early Saturday morning, about the 5th.

Q. Where was this store that you were going to? A. It was 7th and M Street.

Q. And you were walking towards 7th and M? A. I had been there. I was on my way back home.

Q. You were on your way back home? A. That's right.

Q. To 606 M Street? A. That's right.

Q. And about what time of morning was that? A. I'd say around about 1:30.

Q. About 1:30 in the morning? A. That's right.

Q. And about how far had you gotten close to home? A. I'd say about 6 1/2 Street. You know, that little short street that runs into M Street; a short street.

THE COURT: Mr. Nevitt, will you read that last answer? (The last answer was read by the Reporter.)

Q. There is a street there called 6 1/2? A. That's right.

20 Q. And that street is between 6th and 7th, is that right? A. It runs from M Street to N Street; a short street.

Q. Now, when you were in that vicinity, tell the Court and ladies and gentlemen of the jury what, if anything happened. A. Well, two boys came up behind me and one struck me back of the head and knocked me down and then jumped on me and stripped my pants on the side and taken my money out of my pocket and my cigarettes and beat me up.

THE COURT: I am going to have that answer read. (The last answer was read by the Reporter.)

Q. Now, sir, how much money did you have on your person at that time? A. I had a five dollar bill and two ones.

* * * * *

21 Q. Did there come a time when you saw a policeman? A. At the time the police came up and pulled him off of me when they had me down.

Q. Where were you when you saw the policeman? A. They had me down in the 600 block of M Street.

Q. You said they had you down. Down where, sir? A. Right there there is a little short street. 6 1/2 Street run out from N Street. 6 1/2 Street run out from N Street to M Street.

22 Q. Was it down on steps, the ground? A. On the ground.

Q. Down on the ground? A. That's right.

Q. Now, were both of those other persons on the ground too? A. Well, they had me down. He was just on top of me, beating me.

Q. When you said they were on top of you beating you, in more detail, sir, tell the Court and jury exactly what they were doing. A. He was just beating me and ripped my pants down and taken my money off of me.

Q. Where were you being beaten on the body? Where? A. Up here, to my chest, and hit me back of the head and beat me all on the side (indicating).

* * * * *

23 Q. Now, sir, what happened to your pants during this time that these persons did this to you? A. They just tore the pockets out of

24 them, you know, and ripped them on each side.

* * * * *

25 Q. Now, did there come a time after the police arrived that you
looked into your pockets? A. No, sir, I sure didn't. I didn't look in
no pocket at all.

Q. When did you find out the money was missing? A. After they
taken me to No. 2 with the boys; * * *

* * * * *

27 Q. Now, when you were at the precinct did you also see these two
28 people that you say did this to you? A. Well, I didn't pay them
much mind, I was hurting so bad. I didn't pay them much attention.

Q. Let me ask you this. Do you see any one of those persons in
the court room any place today? A. I see one sitting over there.

Q. Where is he, sir? A. There is one of them (indicating).

Q. Would you identify him by what he is wearing? A. Well --

THE COURT: Let him come down and point him out.

MR. ALEXANDER: Would you come down from the witness stand,
sir, and touch him on the shoulder? (The witness complied.)

MR. ALEXANDER: Thank you, sir. You may be seated. (The
witness resumed the stand.)

MR. ALEXANDER: Let the record show, if the Court please, that
the witness has identified the defendant.

THE COURT: Yes, the record may so show.

* * * * *

29 CROSS-EXAMINATION

BY MR. HERMAN:

* * * * *

36 Q. Mr. Edwards, did you or did you not tell the policeman at the
precinct when you were brought in and when they asked you how much
money was taken from you, did you say \$30? A. \$7.

Q. You told them that at the precinct? A. No, I told what I had
on me, this colored policeman. I told him when he carried those two
boys to No. 2 what happened.

THE COURT: Read the question again. Listen to the question very

37 carefully and answer the question yes or no. (The question was read by the Reporter.)

THE WITNESS: I told the policeman on the way to the precinct how much money I had, the policeman that arrested them two boys and carried them down to the precinct. I told him that they taken \$7 off me.

THE COURT: You have answered the question.

BY MR. HERMAN:

Q. You told this to the policeman on the way to the precinct?

A. That's right.

THE COURT: Now will you read the preceding answer? (The answer was read by the Reporter.)

Q. That is all you told the police? A. That's right.

Q. How did you carry your money, in a wallet or just in your pocket? A. I had it loose in my pocket. I didn't have no wallet on me.

Q. You didn't have no wallet? A. No, sir.

* * * * *

38

BY MR. HERMAN:

Q. Mr. Edwards, when these two persons approached you in the street that night -- A. No, sir, they never said nothing to me.

Q. I am referring to the defendant and this other person that you testified struck you in the street. A. Came up behind me and struck me back of the head.

Q. You don't know who struck you, you were hit; is that right? A. That's right, I was hit back of the head.

Q. Were you unconscious? A. Not exactly. It knocked me down. It just knocked me down. Then they jumped on me, ripped my pants and took my money out of my pocket.

Q. Did you stay down on the ground or get up? A. Well, the police came down and pulled them up off me.

Q. You were down on the ground? A. That's right.

Q. Both of them on top of you? A. Yes.

Q. Who was trying to get into your pocket, if anybody, do you know? A. I don't know exactly which one it was was in my pocket.

* * * * *

45

JOHN H. MITCHELL

called on behalf of the Government, and having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ALEXANDER:

Q. Officer, would you state your name and assignment, please?

A. John H. Mitchell, assigned to the 2nd Precinct, Metropolitan Police Department.

Q. Directing your attention, sir, to November 5, 1960, were you so assigned? A. I was, sir.

Q. And directing your attention, sir, to that same date, could you tell us what was your tour of duty? A. I was working the 12 midnight to 8 a.m. tour of duty.

* * * * *

46

Q. And directing your attention to that same date and tour of duty, sir, did you have an occasion to be about the 600 block of M Street, Northwest, in the District of Columbia? A. That's correct, sir.

* * * * *

47

Q. State for the Court and ladies and gentlemen of the jury about what time, sir, did you see the defendant Harris, where and under what circumstances? A. It was about 2 a.m. on that morning, I observed the defendant Harris down on the complainant, beating him and ripping his pants pockets off.

THE COURT: Would you repeat that last answer? Don't let your voice go down.

THE WITNESS: Ripping his pants pocket off.

BY MR. ALEXANDER:

Q. And where was that, sir? A. That was on the northeast corner of 6 1/2 and M Streets, Northwest.

Q. And was the defendant Harris at that time alone, sir? A. No, sir, he was not.

Q. Who else was there at the time? A. He was in company with a juvenile known as James Alton Pearsall.

Q. And have you -- strike that. Could you tell us what James Pearsall's age is, sir? A. He is a colored male of about 17 years old.

Q. And under what circumstances did you see James Pearsall at that time and place, sir? A. Pearsall was standing up over the defendant and complainant.

48 Q. Upon observing this, sir, where were you at the time? A. I was actually about two feet from all of the action.

Q. What, if anything, did you then do, sir? A. I then ordered Pearsall to step back and sit on the knoll of the street and also I had to pull Harris off of the complaining witness.

Q. Now, did you observe the pockets of Mr. Edwards? A. Yes, sir, I did.

Q. And in what condition did you find them? A. They were completely ripped off.

THE COURT: What was your answer, officer?

THE WITNESS: They were ripped off.

Q. About a distance of how far, sir, were they ripped, when you say they were ripped off? A. Well, he couldn't hold his pants up, they were torn so badly until he couldn't hold his pants.

Q. Do you see the defendant Harris in the courtroom, sir?
A. I do, sir.

Q. Would you identify him? A. He is sitting at the table with counsel of the defense, with the gray sport shirt on.

MR. ALEXANDER: Would the record show that the witness has identified the defendant, your Honor?

49 THE COURT: The record may so show.

* * * * *

51 Q. Did you observe Mr. Edwards? A. Yes, sir.

Q. Can you tell us of your observation, sir, other than you testified about his ripped pockets, his person, his face or any part of his body, anything unusual? A. His face was bloody. He had knots on his head and there was a lump on his side.

Q. After arriving at the precinct, then did you interrogate the defendant Harris? A. I did, sir.

52 Q. And who else was present, sir? A. The juvenile, James Pearsall, was present also, and the complaining witness.

Q. At that time about what time was it? A. This was about 2:15 a.m.

Q. And where were you in the precinct, sir, during this interrogation? A. We have an interrogation room in the back of the precinct.

Q. At that time what questions, if any, did you ask the defendant and what, if any, answers did he give? A. I again asked the defendant if he had --

Q. Sir, in answering would you keep your voice sufficiently loud and speak distinctly? A. Yes, sir. I again asked Harris had he robbed the man. He denied it. At that time the juvenile Pearsall said, "We might as well admit it because he caught us anyhow, redhanded."

Q. Was there further conversation, sir, after Pearsall's statement? A. I asked the complaining witness in the presence of the defendant how much was taken.

53 Q. Don't answer that. Did the defendant Harris have any more to say as a result of or after Mr. Edwards' statements? A. He said that he didn't want to go to jail.

THE COURT: He said what?

THE WITNESS: He didn't want to go to jail.

BY MR. ALEXANDER:

Q. Was that the final extent of his statement? A. Yes, sir, I believe it was.

Q. Now, this statement about not wanting to go to jail, was this made after Pearsall's statement? A. Yes, sir.

Q. Did there come a time when you searched the defendant Harris? A. Yes, sir.

Q. And where was that? A. That was on the scene of the robbery.

Q. At the scene of the robbery? A. Yes, sir.

Q. And what, if anything, did you find, sir? A. I found a wallet.

THE COURT: What was your answer?

THE WITNESS: I found a wallet.

Q. And what kind of wallet was that, sir? A. May I refer to my notes, please?

54 MR. ALEXANDER: If the witness has exhausted his recollection, your Honor, would the Court permit him to refresh it?

THE COURT: Yes, indeed.

THE WITNESS: (Examining notes) I recovered two dollars in bills from Harris' wallet.

MR. ALEXANDER: Would you mark this, if the Court please, Government's Exhibit No. 1 for identification?

(Envelope and contents marked Government Exhibit No. 1 for identification.)

BY MR. ALEXANDER:

Q. I show you this item, sir, marked Government's Exhibit No. 1 for identification. Can you identify the contents thereof? A. Yes, I can, sir.

Q. And what are the contents, sir? A. Two one-dollar bills which were recovered from the defendant Harris.

56 * * * * *
Washington, D. C.
January 4, 1961
* * * * *

57 CROSS-EXAMINATION

BY MR. HERMAN:

58 * * * * *
Q. How far were you away from this scene when you first saw these men? A. Approximately a half a block. I was at the corner of 6th and M Street, Northwest.

Q. And from a half a block away you saw these figures on the ground? A. Yes, sir; I could observe the defendant beating, striking some object on the ground. So, naturally, I investigated.

Q. Did you see anybody else except the defendant? A. Yes, sir, I saw the juvenile in this case, Pearsall.

Q. You also saw him from a half a block away? A. Yes, sir; he was standing up.

Q. He was standing up, the other two were on the ground? A. Yes.

Q. What was the lighting condition there at the place where the men were? A. There is a street light just on the opposite corner, which would reflect them.

Q. They were under a street lamp? A. Across from it, yes, sir.

Q. Across from there? A. Yes, sir.

Q. How wide was the street? A. 6 1/2 Street is a narrow street.

* * * * *

61 Q. What did you say, if anything, to Edwards? A. I asked him what were they doing to you.

Q. What did he say to you? A. They are robbing me.

Q. What did you say, if anything, to Harris, the defendant?

A. I ordered him to sit back beside the other juvenile in the case.

Q. Did you ask Harris whether he was robbing Edwards? A. Yes.

Q. What did Harris say, if anything? A. He said he wasn't; he denied it.

Q. Did you say anything to Pearsall? A. Yes.

Q. What did you say to him? A. I asked him what happened.

Q. What did he say, if anything? A. He said, Oh, we might as well go ahead and admit it.

Q. He said it to you? A. We are caught now. Yes, sir; he looked towards Harris and told him that.

Q. At the scene of the-- at the scene there? A. Yes, sir.

62 Q. Did you search Edwards at the scene? A. No, sir, I didn't search him.

Q. Did you search Pearsall at the scene? A. No, sir.

Q. Did you search Harris at the scene? A. No, sir.

Q. Did you testify yesterday that you obtained a wallet from Harris at the scene? A. No, sir; in the station.

Q. In the station?

* * * * *

63 Q. Did you look carefully at the complaining witness Edwards?

A. Yes, sir, I did.

Q. What did you observe as to his physical condition? A. That he had blood on his face, he was beaten, had knots on his head and on his side.

Q. Did this blood come from his nose? A. Yes, sir.

Q. He had a bleeding nose, in other words? A. Well, I couldn't say exactly where he was bleeding from. Possibly he could have been bleeding from the lip also. I couldn't exactly say where the origin of the
64 blood was coming from.

* * * * *

66 Q. Now, with respect to Harris, the defendant, what did you find upon him? A. I found two dollars.

Q. And what else? A. A wallet, his wallet.

Q. Now, the two dollars were in his wallet? A. Yes, sir.

Q. You removed the wallet from his person? A. Yes, sir.

Q. Where was the wallet on his person when you found it? A. It
67 was in his right hip pocket.

Q. Now, you opened the wallet? A. Yes, sir.

Q. Now, in what part of the wallet did you find the two dollars?

A. There is only one part that I know, and that is where it is normally kept, in the billfold compartment.

* * * * *

68 Q. Now, at the time that you removed these two dollars from Harris' wallet where was Edwards? A. Right there.

Q. Did he observe you remove these two dollars? A. Yes, sir.

Q. What did he say, if anything? A. I don't recall what he said.

Q. Did he at any time identify these two dollars as his? A. Yes, sir, I believe so.

Q. Well, how did he do that, sir, and when? A. I believe it was right after I had removed them, removed the two dollars from his wallet.

Q. Well, then, he did say something? A. I can't recall whether he said it right then or when he said it, but he did say in the presence of the defendant, the two defendants, that those were his two dollars.

Q. Did he attempt-- A. It was his money; he didn't say two dollars.

Q. What did he say? A. That was his money.

69 Q. He didn't say this was his two dollars? A. No, sir.

Q. Now, did he attempt to identify in any way this money as his?
A. No, sir, other than just saying that was my money.

* * * * *

74 JAMES PEARSALL

called on behalf of the defendant, and having been duly sworn, was examined and testified as follows:

75 DIRECT EXAMINATION

BY MR. HERMAN:

Q. Will you state your name, please? A. James Pearsall.

* * * * *

78 Q. Now, to go back a little, Mr. Pearsall, at the time the police officer came up what were you doing? A. I was on the ground there. I think the three of us were on the ground then.

Q. The three of you were on the ground? A. All three of us fell to the ground.

Q. And what did the officer do physically? A. Well, he pointed a stick at us and told us to sit over on the wall, and we sat on the wall. And a guy was on the other side of the street and the officer called him and sent him to the box. He called for some help.

* * * * *

82 CROSS-EXAMINATION

BY MR. ALEXANDER:

* * * * *

94 Q. Now, when you say you saw it at the precinct, would you tell the Court and jury what you observed about Mr. Edwards' pockets? A. His pocket was tore.

Q. They were both torn? A. One. I saw one torn.

Q. You saw one torn? A. Yes.

95 Q. Now, about a length or distance of how many inches, sir, if you
can approximate? A. I couldn't say how many inches. I guess
around five inches, I guess.

Q. Now, can you tell us, if you know, whether or not this happened
when you were fighting in a standing position, as you say, with Mr.
Edwards, or whether or not, if you know, it happened when he was on
the ground? A. I couldn't say exactly when it happened.

* * * * *

101 Q. Sir, did you at any time say, after your arrest, that you might
as well admit this crime? A. No, no.

Q. Did you say -- sir? A. I didn't say nothing like that.

Q. Did you say at any time, We are caught, or words to that effect?
A. I didn't say nothing like that either.

Q. If you said it you would remember? A. If I said something
like that I would remember. I know I didn't say nothing like that.

Q. Now, when the officer told you, as you say, to sit on a wall at
6 1/2 and M after your arrest, who sat there first? A. How should
I know.

Q. You were there. A. I know I was there, but do you think I
can remember who sat down first?

Q. Well, then, tell me this, sir, can you remember whether or
not you said, We are caught? A. I remember I didn't say it.

* * * * *

105 CORDELL HARRIS

defendant, called on his own behalf, and having been duly sworn, was
examined and testified as follows:

DIRECT EXAMINATION

BY MR. HERMAN:

Q. Will you state your name, please? A. My name is Cordell
Harris.

* * * * *

109 Q. Had you seen Edwards any time before that evening? A. I
have seen him on the corner of 5th and M Streets, right across from
110 where I live.

Q. Now, you approached these two figures? You crossed the street, you say? A. Yes.

Q. And when you approached them what did you do? A. After I recognized them I tried to get them to behave themselves.

Q. And how did you go about doing that? A. First I tried talking to them. That didn't do no good so I got in between them.

Q. Now, were they on the ground at any time? A. That I can't remember. I remember sitting on the curb.

Q. How did you try to separate them? What did you do? A. I walked and got in between them and tried to separate them. I had one hand on this John Edwards and another hand on this Pearsall.

Q. Were you dragged to the ground at any time?

MR. ALEXANDER: I object to the form of that question, if the Court please.

THE WITNESS: I can't recall.

* * * * *

113 Q. Did you at any time at the precinct make any statement or
114 admission to the police officers that you had robbed Edwards?

A. No, sir.

* * * * *

115 Q. Did Pearsall say anything to you at the precinct with respect to
admitting any guilt? A. No, sir.

* * * * *

120 CROSS-EXAMINATION

BY MR. ALEXANDER:

* * * * *

125 Q. Now, you said you noticed Mr. Edwards' nose and head bleeding,
is that right? A. Yes, sir, his nose was bleeding.

Q. Did you also say you noticed his head bleeding? A. He was bleeding around the head.

Q. When did you notice that, sir? A. In the precinct.

Q. Did you notice anything about his clothing? A. Yes, sir.

Q. Like his torn trousers? A. I seen his pocket was turned wrong side out.

Q. Did you see that they were torn? A. I didn't notice them that close.

* * * * *

126 Q. Now, sir, did you ever see Pearsall on the ground with Mr.
127 Edwards? A. I can't recall that either. As a matter of fact, I remember sitting on the ground after the police had ordered us to sit, all three of us sitting there on the curb.

* * * * *

136 Washington, D. C.
January 5, 1961

* * * * *

154 JURY CHARGE

THE COURT: * * *

* * * * *

155 In addition to instructing the jury as to the law, the Court has a further function to perform, and that is to summarize the evidence, to discuss the facts and the evidence and to comment on them to the extent to which the Court deems it desirable to do so, in order to aid and assist the jury in arriving at its conclusions and solely for that purpose. The Court's discussion of the facts and the evidence and the Court's comments on them are not binding on you, they are intended only to help you, and you need attach to them only such weight as you deem wise and proper.

156 If your recollection or your understanding or your view of the evidence differs in any way from the Court's recollection or understanding or view of the evidence, then it is your recollection, your understanding and your view of the evidence that must prevail, because as I said a moment ago, the final decision on the facts is solely within your province, my instructions are binding on you only as to the law.

* * * * *

163 * * * At the precinct he again questioned the defendant and again the defendant denied that he had robbed or tried to rob Edwards. Pearsall, who was present, said then, according to the officer, We might as well admit this; and the officer testified that the defendant then replied, but I don't want to go to jail.

164 Now, as I said before, it is for you to determine what the facts are
and where the truth lies.

* * * * *

166 Now, again I want to repeat that what I have said about the evidence
is not binding on you. You must make your own decision on the facts. I
repeat, that is your function and your responsibility. My discussion of
the evidence was intended only to help you; that was its only purpose.

167 * * * * *

Are there any objections or suggestions?

MR. HERMAN: No, your Honor.

MR. ALEXANDER: The Government is content, your Honor.

* * * * *

168 JURY VERDICT

1:45 p.m.

THE DEPUTY CLERK: Who is the foreman, please? (Juror No. 6
rose.)

169 THE DEPUTY CLERK: Mr. Foreman, has the jury agreed upon a
verdict?

THE FOREMAN: Yes, it did.

THE DEPUTY CLERK: What say you as to the defendant, Cordell
F. Harris?

THE FOREMAN: We find the defendant with assault and attempt
of robbery.

THE DEPUTY CLERK: Will you say it again, please?

THE FOREMAN: We found the defendant with assault and intent to
rob.

THE COURT: Ask him to repeat the verdict.

THE DEPUTY CLERK: Would you please repeat your verdict, Mr.
Foreman?

THE FOREMAN: How, ma'am?

THE DEPUTY CLERK: Please repeat your verdict.

THE FOREMAN: The verdict is assault and attempt of rob.

THE DEPUTY CLERK: Mr. Foreman, do you find the defendant
guilty or not guilty?

THE FOREMAN: Guilty.

THE DEPUTY CLERK: Guilty of what, please?

THE FOREMAN: Assault and rob, attempted robbery.

THE COURT: I want to make sure -- this is a very important matter. You find the defendant guilty of what?

THE FOREMAN: Of assault and intend to rob.

THE COURT: Thank you.

170 THE DEPUTY CLERK: Members of the jury, your foreman says you find the defendant guilty of assault with intent to commit robbery; and that is your verdict so say you each and all.

MR. HERMAN: Your Honor, may we have the jury polled?

THE COURT: You may poll the jury.

THE DEPUTY CLERK: Members of the jury, your foreman says you find the defendant, Cordell F. Harris, guilty of assault with intent to commit robbery.

Albert W. Cook, is this your verdict?

JUROR COOK: That is my verdict.

THE DEPUTY CLERK: Mrs. Agnes Carter, is this your verdict?

JUROR CARTER: That is my verdict.

THE DEPUTY CLERK: Arthur B. Campbell, is this your verdict?

JUROR CAMPBELL: That is my verdict.

THE DEPUTY CLERK: Miss Mary I. Bradley, is this your verdict?

JUROR BRADLEY: Yes, ma'am, this is my verdict.

THE DEPUTY CLERK: Charles M. Boyer, is this your verdict?

JUROR BOYER: It is my verdict.

THE DEPUTY CLERK: John M. Bodnar, is this your verdict?

171 JUROR BODNAR: It is my verdict.

THE DEPUTY CLERK: Richard R. Smith, is this your verdict?

JUROR SMITH: That is my verdict.

THE DEPUTY CLERK: David A. Bradley, is this your verdict?

JUROR BRADLEY: That is my verdict.

THE DEPUTY CLERK: Walter G. Christian, Sr., is this your verdict?

JUROR CHRISTIAN: That is my verdict.

THE DEPUTY CLERK: Harry J. Holmes, is this your verdict?

JUROR HOLMES: That is my verdict.

THE DEPUTY CLERK: Roscoe S. Goudeau, is this your verdict?

JUROR GOUDEAU: It is my verdict.

THE DEPUTY CLERK: Charles J. Abarno, is this your verdict?

JUROR ABARNO: It is.

THE DEPUTY CLERK: The jury has been polled, your Honor, and the verdict is unanimous.

THE COURT: Ladies and gentlemen of the jury, the Court wishes to thank you for the time and the attention that you have given to this case.

* * * * *

[Filed February 13, 1961]

JUDGMENT AND COMMITMENT

On this 10th day of February, 1961 came the attorney for the government and the defendant appeared in person and by his counsel, Samuel Herman, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of ASSAULT WITH INTENT TO COMMIT ROBBERY and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) years to Six (6) years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ ALEXANDER HOLTZOFF
United States District Judge

[Filed February 18, 1961]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CORDELL F. HARRIS

:

v.

:

Criminal No. 1009-60

UNITED STATES OF AMERICA

:

AFFIDAVIT IN SUPPORT OF APPLICATION FOR LEAVE
TO PROCEED WITHOUT PREPAYMENT OF COSTS; ON
APPEAL FROM JUDGMENT

* * * * *

V. That the nature of my cause of action is briefly stated as
follows:

A. Indictment untrue to the verdict;

B. The Government violated my rights.

Amendment, Articles 4-5-6-7 and Article 14, Section one.

* * * * *

